WRITTEN EVIDENCE AND ALTERATIONS.

FOR centuries the law has rightly preferred written instruments to oral testimony as evidence on a disputed point. One of the difficulties often encountered in dealing with writings as evidence is the question of their genuineness. In the last analysis if the document has been altered in a material part without the assent of the parties to it, however genuine it may look to be, it is not, in fact, genuine. In the trial of a case, therefore, we first look to see if the document is genuine and, as a part of the question, consider whether it discloses any alteration, in any material part, not authorized by the parties.

For the purpose of determining if the document is genuine as a preliminary to determining if it has been altered we necessarily resort to many tests seldom disclosed in the works on evidence and difficult to find in the reported cases. Hundreds of years ago when but few of our ancestors could write, they had peculiar marks that they made at the end of the document, or they had signet or other rings which they impressed upon the sealing wax so that either the mark or the seal identified the party who could not write his name. In those cases the act of making the mark or stamping the seal was witnessed by one or more witnesses who could write their names. Most documents of age still disclose evidence of the party's mark, his seal, and witnesses to the mark or the seal. Now, however, the acknowledgment and the recording act have taken the place of such proofs of genuineness. Nevertheless, the acknowledgment and the recording act are by no means proof against alterations, nor are they indubitable proofs of genuineness. Then, too, in a large number of cases the writings are never sealed, are never acknowledged, and are never recorded. So long as those writings were in the handwriting of the party, that handwriting in its individual peculiarities was a strong means of identifying the writing as genuine. Now, however, stenographers and typewriters have come into vogue to such an extent that the signature alone is all we have to prove the genuineness of the writing in a great many cases. And it is so easy to fill in a few words or a sentence or two above the signature, or to pick up a blank piece of paper upon which

a person has written his signature to try the pen and afterwards typewrite a document over that signature, that genuineness and alterations become new problems in evidence. If the document is typewritten above the genuine signature of the person, it may be that a letter out of alignment in the typewriter will show either that the document is genuine or that it is not, according to whether or not the typewriter employed in the office of the person signing the document did or did not betray that particular peculiarity at the time the writing was apparently signed. Then, too, the bulk of the commercial paper of the day, checks, notes, drafts, and the like, are upon printed or lithographed forms in common use or in use in particular establishments, and our only proof of genuineness is the signature of one or more persons at the bottom of the document. Often, unfortunately, a person may be a very busy person and may either resort to an engraved signature or a rubber-stamp signature, or, worse still, to a simulated signature of a secretary who reproduces the genuine signature so faithfully that it is difficult for the most expert to tell the difference between the signature of the secretary and the signature of his principal.

The old tests for alterations are no longer sufficient to meet all the new conditions. More scientific tests have become necessary and have come into common use. Forty years ago the common method of trying the question of whether or not the document was genuine was to call some person who had seen the person in question write, or call some banker who knew the signature of the person, or some banker who had compared genuine writings or signatures of the person with that in dispute, and then to take the opinion of the witness as to whether or not the writing or the signature was genuine. In cases of any importance these methods have almost ceased to be used. It is now very rare that a person is called to testify to handwriting or to a signature just because he knows the handwriting or the signature of the person in question. It is almost equally rare in important cases to rely upon the testimony of the banker who knows the signature of the person in question. So, too, it is now rare that a banker is called as an expert in handwriting to compare genuine writings and questioned writings to determine whether or not the questioned writing is genuine. Instead, expert photographers photograph the ques-

tioned document, and large photographs properly made often disclose much as to whether or not the writing in question was performed in the ordinary way. The photograph may show fairly well certain strokes of the pen that the person writing the document or writing his own name would not have made, but that were evidently made for the purpose of making the simulated writing or signature more perfect. A careful examination of the paper, too, by watermark or otherwise, may disclose that the paper was of a manufacture subsequent to the date of the document, or that the paper was of a kind that the person never used, or like facts about it. The expert to-day carefully measures the disputed signature to see if its measurements betray any peculiarities that will help solve the mystery. The ink is carefully examined, because it may appear that the ink is of a kind never used by the person in question, or of a kind not manufactured until long after the signature came into existence. So, too, although the document purports to be an ancient one and has been given that appearance by exposing it to dust, dampness, acids, or other agents, chemical tests of the ink may make it clear beyond all question that in fact the document was recently written despite the ancient appearance. Because the ink is partly absorbed in the paper, is evaporated in part, and gradually hardens, as it grows older it more and more strongly resists certain acids, and the chemist is able to determine with approximate certainty whether the document is comparatively new or the ancient document that it appears to be on its face. So, too, after the chemist has subjected the document to acids, the microscope will come into play, and its magnifying power may disclose peculiarities found or not found in genuine signatures. The microscope may show, after ink has been subjected to acid tests, that the document is in truth an old one, or it may corroborate the chemical test and show it is not an old one. The literature that will help the practitioner solve the problems is not yet abundant, but in such works as Osborn on Questioned Documents the lawyer finds help when he has questions of this character to solve.

For a long time the law refused to receive in evidence genuine documents of the person in question, that they might be compared with the questioned document to determine whether or not it was

genuine. The result was that the trial lawyer was compelled to find some pretext or other that would sustain him in offering in evidence one or more letters or documents having little, if any, bearing on the real merits of the case, for the purpose of afterwards enabling his expert to compare those documents in the genuine handwriting of the person with the document or signature of the person in question. Ultimately England changed this rule by statute. New York and most if not all of the other states of this country did the same. In substance, the statutory change permitted either party to offer in evidence genuine documents or signatures of the person in question for the very purpose of enabling experts or the court or jury to compare such genuine documents or signatures with those in dispute. These statutory changes are more than a quarter of a century old in most of our states, and the statute is hardly looked at in preparing for trial, so settled has become the practice in cases of this character. Indeed, the profession of the present day has almost forgotten, if it ever knew, that the old rule existed. A striking illustration of this fact was recently disclosed.

A Miss DeWitt of Easton, Pa., was placed on trial before Judge Macpherson in the federal court, charged with sending scurrilous letters to a clergyman. She pleaded not guilty. The United States attorney was backed up by able experts who were prepared to testify that the scurrilous letters were in the handwriting of the accused. In due time genuine letters of the accused were offered in evidence to enable the experts to compare them with the letters in question. The genuine letters were objected to on the ground that the criminal law of evidence of the United States, which existed when the Constitution was adopted in 1789, applied, and, therefore, that such evidence was not admissible. The court thus decided the case:

"You have made an excellent argument, Mr. Swartley, but I am compelled to rule the document out. In criminal cases the United States courts are working under the laws passed more than a century ago, the origin of which dates so far back that the reason for them must have long since disappeared. Personally I believe that the evidence should be admitted; under the state law it would be. I have no sympathy with the ruling, but I am bound by it until Congress sees fit to make a change."

The result was that Miss DeWitt was acquitted.[1] Had that case been a civil case the result would have been different, because a test of competency would have been the test applied in civil cases at the same place; for such is the federal statute of evidence as amended June 29, 1906.[2]

The importance of permitting genuine handwriting to be introduced for the purpose of comparison by expert or court or jury can hardly be overestimated. For instance, the Rice will case, involving millions of dollars in property and the question of whether or not Patrick had committed forgery and murder, was practically determined on the result of the comparison of Rice's genuine signatures with his disputed signatures to the will. Patrick, his lawyer, had abundant opportunities to obtain specimens of his genuine signature and cause his signature to his will to be traced from a good specimen of the genuine signature of Rice. Rice was an old man, somewhat illiterate, and his signatures frequently differed not a little from each other; in fact his signature was seldom twice alike. To make assurance doubly sure, Rice's name was signed at the bottom of each page of his will. When the experts came to compare these signatures to the different pages of the will they found that they measured the same, looked the same and were the same to all intents and purposes. They compared them with genuine signatures in their possession and found that all four of them resembled each other more than any one of the eighty-odd genuine signatures resembled any other one. The experts could find no two genuine signatures of Rice that came anywhere near fitting each other, whereas the whole four signatures to the different pages of the will fitted each other perfectly. Not once in millions of times would such a result occur. The court therefore said:

"The name of William M. Rice appears four times upon the alleged will of 1900, and upon critical examination of these four signatures it will be found that they correspond almost exactly, a coincidence which could not possibly happen in the case of four genuine signatures of a person upwards of eighty years of age; and for this reason it does not need the testimony of experts to demonstrate that these signatures were not genuine but tracings." [3]

[1] 2 Journal of Criminal Law, etc., 909, 910; 2 Rose, Code of Federal Procedure, § 1760.

[2] 2 Rose, Code of Federal Procedure, § 1735.

[3] Matter of Rice, 81 N. Y. App. Div. 223–229, 81 N. Y. Supp. 68–72, aff'd in 176

Under the statutes permitting comparison many differing decisions in matters of detail have been made.[4]

In England, where our law of evidence came into being, and where documents were usually kept by the party or his solicitor, visible alterations were looked upon with great suspicion and were fatal to the reception of the document in evidence. So strict was this rule that an immaterial alteration by a stranger was fatal to the document as evidence. In course of time, however, the injustice worked by so strict a rule, and the lack of sound reason to sustain it, became fatal to it. The result was that the law as laid down in Pigot's case[5] was modified and finally overruled. Little by little it came to be settled that an immaterial alteration was not sufficient to shut out the document, and ultimately it was also established that a material alteration by a stranger would not affect the document as evidence.[6]

This doctrine becomes important. For instance: Town bonds were issued to aid the building of a railroad to a town, the law of New York then permitting this to be done, and the constitutional amendment prohibiting anything of the kind not having been then adopted. The statute under which such bonds were then issued contemplated sealed instruments, and the bonds issued contained words in the attestation clause showing that the commissioners had "set their hands and seals" thereto. The commissioners signed these bonds opposite scrolls marked "L. S.", but at that time there was not a statute in New York, as there is now, making the "L. S." the equivalent of a seal. The commissioners omitted to put any seals on the bonds, and they were delivered to the railroad company, pursuant to the proceeding, in this condition, without seals upon them. Afterwards, the railroad company sold these bonds to *bonâ fide* holders for value, in good faith, such purchasers finding seals upon the bonds when they were delivered to them, and being ignorant of the fact that seals were not on the bonds when they were delivered to the rail-

N. Y. 570–571, 68 N. E. 1123 (1903); Osborn, Questioned Documents, 111, 274, 298, 299, 300.

[4] Jones, Evidence, 2 ed., §§ 551–552.

[5] 11 Coke 26 *b*.

[6] 3 Phillips, Evidence, Cowan, Hill & Edward's Notes, 389, and cases cited.

road company. In a suit in equity to cancel the bonds for various other reasons, it was also claimed that they should be canceled because of the material alteration in them which was thus brought to the very doors of the railroad company itself, by the undisputed facts. A very able court held that the form of the statute and the form of the bonds did not carry any authority to the railroad company to affix seals to the bonds; also that treating the addition of the seals as a material alteration, that material alteration, even if it was assumed that it was made by the railroad company as an interested party, would not justify a court of equity in canceling the bonds in the hands of innocent holders, when there was no proof that the seals were added for a fraudulent purpose. The court of equity, therefore, refused to cancel the bonds in the hands of *bonâ fide* holders for value, on the theory that it would not be equitable to cancel them under the circumstances.[7]

The court of equity having refused to cancel the bonds, as stated, an action was brought to recover the unpaid interest coupons attached to the bonds. The judgment in the equity action which had determined that the bonds were valid bonds, was put in evidence to sustain the claims of the holders of the coupons, and as being *res judicata* on the town that the bonds were valid, and, therefore, sufficient evidence upon which to warrant judgment against the town for the interest on the bonds. The town insisted, among other things, that the equity judgment was not conclusive, especially on the issue of alteration. The court discussed that issue on its merits, as well as on the basis of *res judicata*. As to the merits, it held, in substance, that the court of equity had the power to disregard the alteration, in the absence of any words in the statute making the bonds void if seals were not attached, and that in doing so the court of equity in effect corrected the mistake or misunderstanding in not attaching seals to the bonds, and they thus became valid bonds. At all events, the court was of the opinion that the issue was no longer open, after the question had been passed upon by a court of equity.[8]

The result in the equity suit reminds one of the suit in equity in Vermont that came before a lay judge of that state at an

[7] Town of Solon *v.* Williamsburgh Savings Bank, 114 N. Y. 122, 21 N. E. 168 (1889).

[8] Williamsburgh Savings Bank *v.* Town of Solon, 136 N. Y. 465, 32 N. E. 1058 (1893).

early day, when such judges could sit in such cases, the issue being the validity of an unsealed deed, and the lay judge, being informed on the argument that equity regarded that as done which should have been done, said to the counsel who claimed that the d ed was void: "If a seal had been put on this deed, it would have been good?" He said "Yes." "A seal should have been put on this deed?" He said "Yes." "Well," said the judge, "a court of equity sits for the purpose of compelling parties to perform their contracts, and instead of directing your client to put a seal on this deed, I will put one on myself," and suiting the action to the word he did so, and handed it to the dumfounded counsel, with the remark: "Now that is a good deed." This summary procedure was too much for the counsel, as I am informed by the Vermont lawyer who told me the story, and he had no courage to take an appeal.

The importance of this principle may be illustrated in another case. An important mortgage is made. It is upon the property of a woman whose husband looks after the details of the matter for her although without specific authority to represent her as her agent. After the mortgage was made and executed by the woman, by direction of the husband in the absence of his wife, the attorney who prepared it inserted a further provision making it security for other notes and drafts. Of this alteration by the insertion of the additional provision the woman knew nothing until a foreclosure of the mortgage was commenced. Thereupon she pleaded the alteration in the mortgage as a defense. Upon the trial the facts appeared without dispute, and the court therefore held that the husband not being the agent authorized to make the alteration, the alteration by the attorney at his instance was an alteration by a stranger. The court therefore rejected the provision inserted after execution, and enforced the mortgage as if that provision had never been inserted.[9]

In the case last cited, however, in the absence of suspicious circumstances calling for explanation or evidence to show that the rejected clause was inserted after execution, the presumption of law would have been that the clause was inserted before or at the time of execution and, therefore, the mortgage would have

[9] Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283 (1893), and English and American cases there cited.

been enforced as if the rejected clause had been inserted before execution.[10]

As to wills, the law is thus stated by Stephen:[11]

"Alterations and interlineations appearing on the face of a will are in the absence of all evidence relating to them presumed to have been made after the execution of the will."

I have observed no American edition of Stephen's accurate work taking issue with this statement of the law, although I cannot lay claim to having examined all American editions. In the notes of some of the American editors to Mr. Stephen it distinctly appears that some of the American cases are in harmony with the English cases which sustain the proposition thus laid down by Mr. Stephen. Moreover, an examination of American works on evidence will show that a large number of American authors accept the law as laid down by Stephen as the law of this country. After a careful examination of many cases I am satisfied that in a large number of our states the law of this country is different from the law of England as to alterations in wills. The English Wills Act and the American statute found in most states are not the same in substance. The English rule, too, developed under different circumstances and conditions from those prevailing in this country. The statute in this country that usually prevails makes it logical for our courts to presume that apparent alterations in wills in the absence of suspicious circumstances were made before execution. In England, on the other hand, the statute at least suggests that an alteration should be deemed to have been made after execution in the absence of evidence to the contrary. The English statute[12] provides:

"No obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid . . . unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the

[10] Stephen, Digest of Evidence, Art. 89, and cases cited by editors of American editions; Little *v.* Herndon, 10 Wall. (U. S.) 26 (1869).

[11] Art. 89.

[12] 1 Vict. c. 26, § 21.

subscription of the witnesses be made in the margin or on some other part of the will opposite or near to said alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will."

Having this statute in mind, it seems reasonably clear that where an alteration appears in an English will, compliance with this statute requires that the alteration be verified by the signature of the testator and the witnesses in the margin or on some other part of the will or at the foot of it as required by the statute. Otherwise the court will necessarily reject it on the theory that it is presumed to have been made afterwards, because it is not authenticated as having been made before or at the time of execution as required by the statute.

The American statute, however, the law in force in New York and most states, requires the following things in the execution of the will:

1. That it be "subscribed by the testator at the end of the will";
2. That this be done by the "testator in the presence of each of the attesting witnesses or . . . acknowledged by him to have been so made to each of the attesting witnesses";
3. The testator at the time of signing or acknowledging it "shall declare the instrument so subscribed to be his last will and testament";
4. "There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator." [13]

In Massachusetts and perhaps some other states three attesting witnesses are required instead of two, but so far as I have observed the statutes are substantially the same in most if not all of our states.

It will be observed that in this American statute not a word is said about alterations or how they shall be evidenced. It is true that in practice alterations made before execution or at the time of execution, if made under the advice of an experienced lawyer, are usually witnessed on the margin by the initials at least of the testator, or else such alterations are enumerated in the attestation clause after the signature of the testator but before the signatures of the attesting witnesses. Suppose, however, the will is all in the

[13] 1 N. Y. Consol. Laws, Decedent Estate Law, 500–501, § 21.

handwriting of the testator, and it discloses alterations but discloses nothing as to when the alterations were made. Is there any reason in the American statute, or in the law of evidence, for determining, in the absence of other evidence, that the alterations were not made before the will was subscribed by the testator and witnessed by the attesting witnesses? I can find none.

Assume, however, that the will is all in the handwriting of the testator, but that alterations appear in it in a different ink in his own handwriting. May we not then conclude that the alterations were made after the will was originally written? Must we not conclude that as the alterations are in different ink they must have been made after the will was written by the testator? If scanning the will closer we find no ink employed by either the testator or the attesting witnesses such as the ink in which the alterations appear, are we not forced to the conclusion that the different ink was used by the testator at a different and later time than the time of execution?

Substantially the case last supposed came before Surrogate Rollins, a very experienced and able lawyer and judge, in 1882. His opinion shows that from the will itself he was satisfied that the alterations were made by the testator after the execution because a different ink was employed from that in which the will was written, signed, and witnessed, and as the testator had the will in his own possession the conclusion was irresistible that he made the subsequent alterations in a different ink subsequent to the execution. The alteration was important, as it cut down a legacy from five thousand dollars to two thousand dollars. The surrogate, however, not only called attention to these facts as a reason for his decision, but he examined the English statute of wills and the English decisions, and rested his conclusion as well upon the proposition that it was a presumption of law that the alteration was made after the execution of the will. In so doing he did not observe the difference between the English and American statutes, but instead seemed to think they were substantially the same so far as the question involved was concerned.[14]

A little later the Court of Appeals had a somewhat similar case before it.[15] There duplicate wills were executed at the same time,

[14] Wetmore *v.* Carryl, 5 Redf. Sur. (N. Y.) 544 (1882).

[15] Crossman *v.* Crossman, 95 N. Y. 145 (1884).

and an interlineation was noted at the bottom of one before the attestation clause with the statement that it was made before signing. The court said:

"Here from all the circumstances it was at least for the Surrogate to determine whether this interlineation was made before or after execution; and in making that determination he was bound to consider the handwriting, color of the ink, manner of the interlineation, the fact that it was noted at the bottom of the instrument and that it was made to correspond with the other duplicate. Where an interlineation or erasure is fair upon its face and is entirely unquestioned, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court in deciding whether the alterations were made before execution or not."

The case last cited is a leading case and is followed in New York.

In the second edition of his work on evidence, Mr. Jones discussing this very subject after quoting Stephen on Evidence, says: "As will be seen when the different views are stated, it would be vain to attempt to reconcile the decisions on this subject in the United States. It will be found, however, that the distinction which exists in England with respect to deeds and other instruments is not generally made in this country. The mere fact that there is an interlineation would not seem to call for any explanation provided the appearance of the writing and ink is such as to indicate that the whole was written at the same time and by the same person." [16]

The opinions of other text writers are collated below.[17]

[16] Jones, Evidence, 2 ed., § 563, and cases cited.

[17] The difference between the English and American statutes underlying the decisions seems to have been generally overlooked and many authors dodge the question. Others are more helpful. For instance, Best gives the English rule that interlineations will be presumed to be at the time of making the deed; but an erasure or alteration in a suspicious place must be explained, and in the case of wills, the presumption is the other way, attributing the exception to the Wills Act. Best, Evidence, 10 ed., § 229. This appears also to be the law of Canada. *Id.*, Canadian Notes, p. 448. Taylor gives as the English rule that an alteration in a deed is presumed to have been cotemporaneous with execution, in a will after execution, and with respect to a bill of exchange or promissory note, the law presumes nothing. Taylor, Evidence, 10 ed., § 1819. Elliott says of the American decisions: "There

In cases where the will is prepared by an experienced lawyer such care will be taken about the interlineation that the attestation clause will account fully for any alterations, erasures, or changes of importance. If such changes are important and there is time to do so, the will, or the part of it that requires change, is usually rewritten or re-typewritten to eliminate all alterations and erasures, and, consequently, we find few cases presenting these questions where wills have been prepared by experienced lawyers.

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is almost hopeless conflict among the decisions in this country as to the burden of proof and presumption, if any, where the alteration is apparent upon the face of the instrument." He classifies the cases into four groups, holding: (1) that no presumption arises and the question when the alteration was made is for the jury in the light of all the evidence, intrinsic and extrinsic; (2) that the presumption is that the alteration was made after execution and delivery; (3) that the presumption that the alteration was made after execution and delivery arises only where the alteration or facts surrounding it are suspicious; (4) that the alteration is, without explanation, presumed to have been made before delivery. 2 Elliott, Evidence, § 1504. This author says there is, perhaps, more reason for presuming that an alteration in a will was made after execution, and lays down the general rule that an alteration of a will found in the custody of the testator is presumed to have been made after execution, by the testator; but, if found in the custody of one interested in suppressing it, the alteration will not be presumed to have been made by the testator. 3 *id.*, § 2700. Wigmore states that the modern tendency is to avoid stating the problem in the form of rules and exceptions, and to abandon the presumption that an alteration of a deed was made before execution, and to raise no genuine presumption in that regard. Wigmore, Evidence, § 2525.